



Appeals court overturns decision on Boulder Canyon refunds

A decade-old issue concerning refunds of excess revenues collected from the Boulder Canyon Project was resolved in September when the U.S. Court of Appeals for the Federal Circuit overturned a previous decision by the Court of Federal Claims.

The case filed against Western by Southern California Edison Company and the Los Angeles Department of Water and Power claimed that refunds of the excess revenues distributed by Western in 1990 and 1991 were unfair. The appeals court found that Western acted reasonably.

Western Counsel **Doug Harness** is relieved to see this case may be closed. "The dispute has been going on for a long time! The refunds were made in 1990 and 1991. The first cases were filed in 1996. The most recent decision was issued in September. Conceivably, SCE and LADWP can still appeal the Appeals decision to the U.S. Supreme Court, but this is not the kind of case the Supreme Court is likely to accept. We hope that this is over," Harness said.

After the initial 50-year contract period for Boulder Canyon power ended May 31, 1987, an accounting of project costs determined that Western owed excess revenues of about \$25 million to nine customers who had received and paid for Boulder Canyon energy during this time. After consulting with the affected customers, Western paid refunds of the over-collected sum in proportion to each customer's firm energy allocation.

Thus, under this formula, a customer entitled to 10 percent of the firm energy generated at Hoover Dam was entitled to 10 percent of the refund amount.

After receiving its refund, SCE auditors reviewed the matter and concluded that if Western had taken into account both non-firm and firm power sales, SCE's refund would have been much larger. LADWP later joined SCE in this position.

For five years Western, SCE and LADWP debated the correctness of the way Western figured the refunds. Western's position was that the distribution method was proper, but if all nine Boulder Canyon customers agreed to redistribute the refund, it might be an acceptable resolution. However, the other seven had no interest in altering the refunds.

In an attempt to put the matter to rest in February 1996, Western filed suit in U.S. District Court in Nevada seeking a judgment that the refund was appropriate and not an abuse of the government's discretion.

LADWP and SCE countered by filing complaints in the U.S. Court of Federal Claims, seeking about \$3 million each by alleging that Western breached its power contracts with them by improperly distributing the refunds. The Court ruled that the refunds should be recalculated, with additional refunds of more than \$1 million going to LADWP and SCE.

Western appealed the decision to the U.S. Court of Appeals for the Federal Circuit in April 1999. Finally in September, this Court overturned the previous decision, finding that Western's method of refunding the excess revenues was reasonable and should stand.

Under existing legal precedent, a Federal agency's interpretation of its own regulations is entitled to deference, or should be honored, by reviewing courts, particularly when the regulations are being applied to a complex or changing circumstance. Harness added, "On a broader scale, the Appeals decision provides Western with a strong legal argument that other courts should also defer to Western's expertise in administering its power program." ■

